STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	)	Docket No. 01-AFC-17
	)	
Application for Certification for the Inland Empire Energy Center	)	
	)	

APPLICANT'S OPENING BRIEF

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I. INTRODUCTION

Pursuant to the Committee's direction at the close of Evidentiary Hearings on July 30, 2003, Inland Empire Energy Center LLC ("Applicant") hereby files the following Opening Brief for the Inland Empire Energy Center ("IEEC") Application for Certification ("AFC"). The Staff of the California Energy Commission ("CEC" or "Commission") has proposed Conditions of Certification for the IEEC. The Applicant and Staff are in agreement regarding all but three of these Conditions.

First, the Staff and Applicant disagree on the terms of Condition COM-15, which is discussed below at Section IV.A. The second area of disagreement concerns Condition AQ-SC3, wherein the Staff has proposed new conditions for soot filters on construction equipment engines. As we describe in Section II.D(1)(b) of our Brief, the Applicant has proposed the same requirements that were recently proposed by the Committee in the East Altamont Energy Center ("EAEC") proceeding and adopted by the Commission in its Final Decision on the AFC on August 20, 2003. The Staff, on the other hand, has proposed new, more stringent requirements

for soot filters that are unprecedented in Commission proceedings or in any other regulatory program.

The third area of disagreement concerns Condition AQ-SC5. In addition to the extensive range of mitigation and monitoring measures that the Applicant will implement to suppress fugitive dust during construction, the Staff proposes that the Applicant implement an additional ambient monitoring program for these temporary activities. As shown in Section II.E of this Brief, this additional ambient monitoring program is unnecessary, ineffective and impractical. The Committee should delete Staff's proposed Condition AQ-SC5.

Finally, although the Staff and Applicant agree on the language of the conditions governing RECLAIM Trading Credits ("RTCs"), the Staff has stated that it "cannot recommend certification of the IEEC project" until the Applicant has obtained all NOx RTCs for the first year of project operation. As shown in Section II.F of this Brief, the Staff's position on this issue serves no public interest, violates the applicable law and is inconsistent with the Staff's treatment of another project presenting this same question. The Commission should disregard Staff's professed inability to recommend certification and find that the Applicant has satisfied the requirements of Public Resources Code Section 25523(d)(2).

II. AIR QUALITY

A. The IEEC Project Will Comply with the Applicable Federal, State, and Local Laws, Ordinances, Regulations, and Standards, and with Mitigation, Does Not Result in Any Significant Air Quality Impacts.

Substantial evidence in this record demonstrates that the Inland Empire Energy Center is safe, and will meet all applicable air quality standards. This is true under all operating conditions, under all meteorological conditions and at all locations, based on conservative assumptions regarding background or existing air quality, operating levels, emission rates and

meteorology. (7/30 RT 134-136). In addition, the record supports the conclusion that there are no significant, unmitigated air quality impacts associated with the Inland Empire Energy Center if the conditions proposed by the Applicant are adopted. (7/30 RT 134).

B. The IEEC Project Will Have No Significant Impacts to Local Air Quality.

With respect to local air quality effects, the IEEC project addressed those issues with three different types of analyses: (1) pollution control technologies, (2) air quality impacts analysis, and (3) preparation of a health risk assessment. (7/30 RT 134-135).

1. IEEC Will Meet or Exceed the SCAQMD's BACT Requirements.

To address local air quality impacts, the IEEC project analyzed the appropriate pollution control technology and the "best available control technology" ("BACT"). (7/30 RT 135). BACT is the fundamental cornerstone of any licensing process, requiring that new facilities have to use the cleanest technologies available. By ensuring that projects use the cleanest technologies, potential impacts on local air quality are minimized. (*Id.*)

In this case, the South Coast Air Quality Management District's ("SCAQMD") Final Determination of Compliance ("FDOC"; Exhs. 48, 52 and 69) dated May 8, 2003 (with a May 22, 2003 errata) confirms that the IEEC project complies with BACT. (Ex. 52, pp. 10-14). The Staff, in the Final Staff Assessment, concurred in this conclusion. (Ex. 67, p. 5.1-43).

With respect to carbon monoxide ("CO"), the IEEC project will comply with this BACT requirement through the use of dry low-NO_x combustors that minimize incomplete combustion, and an oxidation catalyst. (Ex. 48, p. 11). The SCAQMD has determined that BACT for CO is an emission limit of 3.0 ppmvd @ 15% O_2, averaged over one hour, without duct firing, and 4.0 ppmvd @ 15% O_2, averaged over one hour, with duct firing. (Ex. 52, p. 14). In simplest terms, the CO requirements in the permit are so stringent that the carbon monoxide concentrations

inside the stack will be at or below the ambient air quality standard for carbon monoxide that is the level that is safe to breathe in ambient air.

Nitrogen oxides ("NO_x") will be controlled as well through a combination of two technologies. One is the use of dry low-NO_x combustors. The second is a system called selective catalytic reduction ("SCR"), a system that the Commission has reviewed many times before and found to be safe and effective. Each combustion gas turbine /heat recovery steam generator (HRSG) train designed to meet a NO_x emission concentration limit of 2.0 ppmvd NO_x @ 15% O_2, averaged over 1 hour, during all operating modes except gas turbine start-ups and shutdowns. (Ex. 52, p. 14). This meets the current District BACT determination and exceeds the US EPA and CARB BACT determinations for NO_x. (Ex. 52, p. 14). The HRSGs will be equipped with low-NO_x duct burners, which are designed to minimize NO_x emissions. (Ex. 1, p. 5.2-27). The duct burner exhaust gases will also be abated by the SCR system and, when combined with the gas turbine exhaust, will achieve NO_x emission concentrations of 2.0 ppmvd @ 15% O_2, averaged over one hour. (Ex. 52, p. 14).

Reactive organic gases ("ROGs") will also be controlled through the use of dry low-NO_x combustors. (Ex. 48, p. 11). The SCAQMD has determined that BACT for ROG is an emission limit of 2.0 ppmvd @ 15% O_2, averaged over one hour. (Ex. 52, p. 14).

Emissions of sulfur dioxide ("SO_2") and particulate matter ("PM_{10}") will be controlled through the use of natural gas as a fuel. IEEC will use exclusively PUC-regulated natural gas, which satisfies the BACT requirement for SO_2. (Ex. 48, p. 11). Similarly, PM_{10} emissions will be controlled through the use of clean burning natural gas for the combustion turbines and the HRSG units, which will result in minimal PM_{10} emissions and minimal formation of secondary PM_{10}. (Ex. 48, pp. 11).

2. IEEC's Air Quality Impact Analysis Confirms That There Will Be No Significant Local Air Quality Effects.

The IEEC project has performed a thorough air quality impact analysis using dispersion models required by the United States Environmental Protection Agency ("USEPA") and the SCAQMD and a number of worst-case assumptions. (Ex. 1, pp. 5.2-32 to 5.2-43; 7/30 RT 135-136; 7/30 RT 267). Specifically, the analysis assumes worst-case operating scenarios, worst-case emissions, and worst-case weather conditions at the project site. (*Id.*) The analysis makes these combined worst-case assumptions even if those conditions physically cannot occur at the same time.[1] (7/30 RT 135-136).

The air quality impact analysis shows the location and levels of the greatest air quality impact. By definition, all other locations would have lesser levels of air quality impacts. In the case of IEEC, the worst-case air quality impacts from the project were located within the South Coast basin, in the hills to the south and east of the project site. (Ex. 1, pp. 5.2-37 to 5.2-38; Ex. 67, pp. 5.1-25 and 5.1-29; 7/30 RT 306).

The purpose of all of these conservative assumptions is to make sure that the IEEC project will not cause any violations of any state or air quality standards at *any* location at *any* time under *any* weather conditions and under *any* operating conditions. (7/30 RT 135). The air quality impacts analysis confirms that this is the case for the IEEC. (*Id.*; Ex. 1, p. 5.1-42; Ex. 67, pp. 5.1-25 to 5.1-29).

[1] For example, the worst-case of emissions from a power plant might occur during winter conditions when the ambient temperatures are lowest and the mass flow through the engines are highest. The worst-case meteorological conditions for dispersion might occur in the summer. The air quality impacts analysis nonetheless assumes that those worst-case emissions aspects of the wintertime apply during the summer meteorological conditions, even though that is not physically possible.

3. The Health Risk Assessment Performed for the IEEC Project Confirms that there are No Adverse Local Air Quality Impacts.

The IEEC Health Risk Assessment ("HRA") confirms that there will be no significant adverse local air quality impacts associated with the IEEC project. The results of the HRA show that the health risk is not significant at any location, at any time, under any operating conditions. The public health impacts associated with the project are not in dispute with Staff.

C. The IEEC Project Will Have No Significant Impacts on Regional Air Quality.

The IEEC project will have no significant impacts on regional air quality. This finding of no significant impact is confirmed by the three components to the regional air quality studies performed by the IEEC project: (1) the use of best available control technology; (2) cumulative impacts analyses regarding regional air quality; and (3) emission offset requirements.

Each of these three regional impact analyses is considered in turn below.

1. The IEEC Project Will Use Best Available Control Technology to Minimize Regional Air Quality Impacts

As discussed above, the IEEC project will use best available control technology to minimize project emissions. Minimizing project emissions is one of the most effective techniques for minimizing regional air quality impacts.

2. The IEEC Project Will Not Cause Any Significant Unmitigated Cumulative Air Quality Impacts.

There have been two cumulative air quality impacts analyses for the IEEC project that looked at the impacts of the IEEC project and other reasonably foreseeable projects against the backdrop of existing background air quality levels. (7/30 RT 136). The first such analysis was included in the AFC. (Ex. 1, pp. 5.2-32 to 5.2-43). As with the local air quality analysis, IEEC used multiple conservative assumptions in its cumulative air quality impact analyses. (For

example, in this analysis, if the highest PM_{10} levels currently in this region occurred in the wintertime, and if the highest project impacts for PM_{10} were to occur in the summertime, the analysis would nonetheless assume that they occurred at the same time.) Even with this level of conservatism, the IEEC project will not cause any new violations of any state or federal air quality standards. (7/30 RT 136; Ex. 1, p. 5.2-42).

This analysis did show, not surprisingly, that the IEEC project would contribute to existing violations of the state ozone standard, and of the state particulate matter (or PM_{10}) standard, that occur during some times in the region. (*Id.*) Because of this contribution to those existing problems, air quality regulations require that IEEC provide the second element of the regional air quality analysis, emissions offsets, as discussed in the next section. It is important to note that, with respect to PM_{10}, the SCAQMD affirmatively concluded that the project would not result in any significant air quality impacts. (Ex. 48, p. 32).

A protocol for a second cumulative air quality impact analysis was included in the Application for Certification. (Ex. 1, Appendix K-8). The analysis demonstrated that the cumulative impacts of the proposed project and other new/modified sources in the project area are not expected to cause a new violation or contribute significantly to an existing violation of any state or federal air quality standard in the project area. (Ex. 2, p. 5.1-7; Ex. 67, p. 5.1-38).

Thus, there have been two cumulative air quality impact analyses prepared for the IEEC project and both of these analyses reached the same conclusion: the IEEC project will not cause any new violations of state or federal ambient air quality standards but will contribute to existing violations of the state and federal standards for ozone and $PM_{10.}$ (7/30 RT 136). These potential cumulative, regional air quality impacts are addressed through the provision of emission

reduction credits and RTCs. (7/30 RT 136-137). These mitigation measures are discussed further below.

3. The IEEC Project has Identified and Will Obtain Emission Offsets to Fully Mitigate Any Potential Regional Air Quality Impact.

Emission offsets are part of a regional mitigation program designed to ensure that new plants of any type can be constructed while still making sure that progress towards cleaner air is maintained. Emission offsets are a requirement of local regulations, state law and federal law. (Ex. 1, pp. 5.2-56 to 5.2-57; Ex. 67, pp. 5.1-6 to 5.1-7).

IEEC will provide offsets for this project as required by the SCAQMD. Specifically, IEEC will provide offsets for all criteria pollutants in the quantities required by applicable law and regulation. (7/30 RT 137; Ex. 2, p. 5.1-8; Ex. 68, pp. 3, 5). There is no dispute that IEEC has satisfied the offset requirements of the SCAQMD.

D. Most Issues of Disagreement Between Applicant and Staff Have Been Resolved.

As a result of discussions between Applicant and Staff during workshops and at the Committee's July 30 hearing, most areas of disagreement between Applicant and Staff in the area of air quality have been resolved. The proposed Conditions of Certification for air quality contained in Staff's Supplemental Testimony (Ex. 68) are acceptable to Applicant with the exceptions noted below.

1. Issues Related to Construction Mitigation

a. Resolved Construction Mitigation Issues

Agreements have been reached between Applicant and Staff regarding proposed Conditions of Certification AQ-SC1 through AQ-SC4, with the exception of the soot filter condition contained in Condition AQ-SC3(o). Agreement has also been reached regarding

Condition AQ-SC6. Staff has agreed to propose revised language for AQ-SC6 that would make clear the acceptability of fugitive dust causing construction activities continuing between the hours of 7 am and 7 pm, consistent with the limitations contained in Condition NOISE-8. (7/30 RT 335).

b. Unresolved Construction Mitigation Issues

Applicant and Staff continue to disagree with respect to Condition AQ-SC3(o) and AQ-SC5. With respect to AQ-SC3(o) (regarding the use of soot filters on construction equipment engines) the issue is straightforward. The Applicant has proposed the same language that was proposed by the Committee and adopted by the full Commission in the East Altamont proceeding when a similar disagreement arose between Applicant and Staff in that case. (Ex. 2, pp. 5.1-10, 5.1-24 to 5.1-25; 7/30 RT 144). Notwithstanding the Staff's failure to object to the soot filter language adopted by the Commission in the EAEC case, the Staff is objecting to the language in this proceeding.

The language adopted by the Commission in East Altamont and proposed by the Applicant here already represents a compromise on this question. Applicant believed in East Altamont (and continues to believe) that the most appropriate condition would be to require either EPA certified engines or soot filters on large equipment, but not both. (7/30 TR p.144). The language adopted in East Altamont, however, requires the use of both under specified conditions. (*Id.*) Nonetheless, applicant recognizes that the Commission has ruled upon this issue and accepts that ruling. In contrast, rather than accepting the Commission's compromise ruling on this matter, Staff invites the Commission to take inconsistent positions by opposing the East Altamont language in this case. Instead, Staff seeks to require soot filters on engines as small as 50 h.p., unless they are "not practical." Staff offers no rationale for why this key term should be left undefined in the Condition of Certification nor has Staff demonstrated good cause

for applying different soot filter requirements to this project compared with East Altamont. As noted above, Staff makes no attempt to show that the temporary construction impacts of the IEEC differ significantly from those of East Altamont.

Apart from the lack of justification and obvious cost, Staff's proposal is also flawed in that it asks the Commission to ignore the judgment of the EPA, the Air Resources Board and the District on this question. None of these specialized air quality agencies demand the imposition of soot filters as proposed by Staff. (Indeed, even the compromise language from East Altamont exceeds all air agency requirements.) Furthermore, as Mr. Rubenstein testified based on meetings with Air Resources Board Staff (including the Executive Officer) specifically on the Staff's proposal:

> …the Air Resources Board has raised substantial concerns about the introduction of soot filters on too-rapid a basis. This is part of a statewide program, construction of power plants is only a very small part of it. And the Air Resources Board wants to make sure that soot filters are implemented in a technically rational manner that will not upset their plan for putting this equipment on a wide range of equipment throughout the state. (7/30 TR. p. 146).

Applicant restates its request that the Committee adopt the same language adopted by the Commission in the EAEC proceeding, as presented in Applicant's testimony. (Ex. 2, pp. 5.1-24 to 5.1-25).

2. Issues Related to Operation Mitigation

a. Resolved Project Operation Issues

Applicant and Staff agree on proposed Conditions of Certification AQ-SC7 through AQ-SC16, and AQ-1 through AQ-54, as presented in the Staff's Supplemental Testimony. (Ex. 68).

b. Unresolved Project Operation Issues

There are no unresolved issues related to Conditions of Certification regarding project operation. However, Applicant disagrees with Staff's conclusion that the project has not

satisfied the requirements of Public Resources Code Section 25523(d)(2) regarding the identification of emission offsets. This issue is discussed in more detail later in this Brief.

E. Proposed Condition AQ-SC5 Relating to Ambient Monitoring During Construction, Should be Deleted.

In addition to the extensive range of mitigation and monitoring measures that will be implemented to suppress fugitive dust during construction of the IEEC, the Staff has proposed, in Condition AQ-SC5, that Applicant perform additional ambient monitoring of PM_{10} concentrations during excavation, earthmoving and grading activities. (Ex. 68, pp. 10-11). The additional ambient monitoring proposed by the Staff is in addition to the proposed visible dust monitoring requirements in AQ-SC4, and is unnecessary, impractical and ineffective. Moreover, the Staff has failed to offer even one compelling argument for why the IEEC project should be singled out for such extraordinary monitoring requirements.

1. The IEEC will be subject to extensive and stringent construction dust mitigation measures and monitoring – additional monitoring is unnecessary.

Dust mitigation and monitoring for the IEEC will be consistent with the requirements of SCAQMD Rule 403. (7/30 RT 140). Rule 403 is particularly relevant to this discussion because it has been adopted by the region's air pollution control agency as the principal method for controlling fugitive dust emissions:

> The purpose of this rule is to reduce the amount of particulate matter entrained in the ambient air as a result of anthropogenic (man-made) fugitive dust sources by requiring actions to prevent, reduce or mitigate fugitive dust emissions. (SCAQMD Rule 403(a))

Rule 403(d)(4) does not require the use of upwind/downwind PM_{10} monitoring at construction sites if the source uses the dust control measures specified in the rule:

> The provisions of paragraph (d)(4) shall not apply if the dust control actions, as specified in Table 2, are implemented on a routine basis for each applicable fugitive dust source type. To qualify for this exemption, a person must:
> (A) maintain records to document the dates of active operations, all applicable fugitive dust source types, and the actions taken consistent with Table 2;
> (B) retain such records for a period of at least six months; and
> (C) make such records available to the Executive Officer upon request. (SCAQMD Rule 403(h)(4))

Like most sources in the South Coast Air Basin, IEEC intends to comply with the provisions of Rule 403 through the use of the prescribed dust control measures. In addition, the Applicant is also bound by Condition AQ-SC4, which provides that:

> No construction activities are allowed to cause visible emissions at or beyond the project site fenced property boundary. No construction activities are allowed to cause visible plumes that exceed 20 percent opacity at any location on the construction site. No construction activities are allowed to cause any visible plume in excess of 200 feet beyond the centerline of the construction of linear facilities.

In order to enforce IEEC's compliance with these measures, Condition AQ-SC1 requires that:

> The project owner shall fund all expenses for an on-site Air Quality Construction Mitigation Manager (AQCMM) who shall be responsible for maintaining compliance with conditions AQ-SC2 through AQ-SC6 for the project site and linear facility construction. The on-site AQCMM shall have access to areas of construction of the project site and linear facilities, and shall have the authority to halt any or all construction activities as warranted by applicable construction mitigation conditions. The on-site AQCMM shall have a current certification by the California Air Resources Board for Visible Emission Evaluation (U.S. EPA Method 9) prior to the commencement of ground disturbance.

Moreover, the on-site AQCMM is required to conduct a visible emission evaluation at the construction site fence line, or 200 feet from the center of construction activities at the linear facilities, each time he/she sees excessive fugitive dust from the construction or linear facility site. The records of the visible emission evaluations shall be maintained at the construction site and shall be provided to the CPM in the MCR.

Given the extensive and stringent scope of fugitive dust mitigation and monitoring requirements already in place, the additional ambient monitoring requirements set forth in AQ-SC5 are simply superfluous.

In addition to being unneeded, Staff's proposed monitoring requirements contradict in several respects accepted monitoring practice pursuant to the requirements of SCAQMD Rule 403. Staff has suggested that the monitors be placed in from the fence line to avoid interference from adjacent sources. (7/30 RT 245-246)). Rule 403(d)(4)(B) requires that monitors be placed "as close to the property line as feasible." Staff has suggested that monitors would be helpful in ensuring that mitigation measures are properly implemented, even under high wind conditions. (7/30 RT 257). Rule 403(h)(2)(A) indicates that monitoring is not required during periods when wind gusts exceed 25 miles per hour provided that specified high wind dust control measures are implemented. Staff has suggested that the monitors be used to provide "real-time" feedback, based on concentrations that may be lower than applicable air quality standards. (7/30 RT 246-247)). Rule 403(d)(4) requires that sampling be performed using EPA-approved methods for PM_{10} as specified in 40 CFR 50, Appendix J. The Appendix J reference method for PM_{10} determines concentrations on a 24-hour average basis, thus precluding the use of the data to provide real-time feedback. Further, Rule 403(d)(4) sets a performance standard for dust control at an upwind/downwind differential of 50 $\mu g/m^3$, which is the state 24-hour average standard.

The provisions of Rule 403 were adopted by the SCAQMD governing board after extensive hearings, have been included in the California State Implementation Plan for PM_{10}, and have been successfully implemented in their current form for over six years. The Committee should give great deference to the scientific and regulatory approaches embodied in that rule, as compared with the untried and unproven suggestions of the Staff.

2. The Staff's Proposed Construction Monitoring Program is Not Well Conceived and Should be Rejected.

a. There Has Been No Demonstration of the Feasibility of Construction Monitoring with Real-Time Feedback.

The Staff has argued that the ambient PM_{10} construction monitoring is necessary to ensure that required mitigation measures are being properly implemented. (7/30 RT 207). The Staff goes on to suggest that ambient PM_{10} construction monitoring can provide feedback, on a real-time basis, to the on-site construction mitigation manager. (7/30 RT 246-247). However, in the Los Esteros construction monitoring demonstration project – which is the only construction monitoring project implemented pursuant to CEC requirements and the monitoring project upon which the proposed monitoring requirement for IEEC is based[2] – there was no real-time feedback mechanism. Under that program, PM_{10} measurements were collected on a 24-hour average basis – thus precluding any ability to provide feedback on the same day when a high concentration might be measured. Further, the Los Esteros construction monitoring demonstration project was performed under a protocol that was approved, in advance, by the Staff – indicating that the Staff had no intention, at that time, of implementing a program with real-time feedback. In fact, there is no demonstration that such a program would be feasible for a power plant construction site. Finally, there are no state or federal ambient air quality standards for PM_{10} that are based on averaging periods any shorter than 24 hours; hence, it is unclear what basis the Staff would have for requiring ambient PM_{10} monitoring for a period shorter than 24 hours.

[2] These additional monitoring requirements were imposed by the Commission in Los Esteros on a demonstration basis only and to mitigate the effect of proposed a "double shift" construction schedule that significantly increased potential 24 hour average dust emissions. (7/30 TR. 155-6). The record shows that this demonstration was a failure. (*Id.*). Moreover, there is no such "double shift" proposal that would increase emissions here.

b. The Dust From IEEC is Not Distinguishable from the Dust from Surrounding Areas During Periods with Low Wind Speeds or Variable Wind Directions.

The IEEC project site is surrounded by particulate emission sources including large dirt areas. These other sources render Staff's proposed monitoring program very difficult to implement. (7/30 RT 250). Although the placement of two monitors at opposite ends of the project site may result in meaningful upwind/downwind measurements that can be used to infer IEEC's contribution during periods of moderate to high winds, no such distinction would be possible during periods of low or variable winds. However, it is during periods of low or variable winds that dispersion is poorest for ground-level sources (such as construction dust), and hence predicted PM_{10} concentrations would be highest. (7/30 RT 156). Moreover, even during periods of high winds, it is likely that the upwind monitors will see higher concentrations (from uncontrolled dust sources off of the IEEC project site) than the downwind monitors, rendering no useful information whatsoever.

c. The Dust from IEEC is Not Distinguishable from the Dust from the Nearby Batch Plant During Periods with Low Wind Speeds or Variable Wind Directions.

The problem of dust from adjacent properties interfering with the IEEC monitoring program is compounded by the proximity of a large source of fugitive dust – a batch plant – immediately adjacent to the project site. As the Committee observed during the July 30th hearing, the proximity of the IEEC monitors to the batch plant will make it difficult to obtain any useful information from the monitoring program during periods when the winds are blowing from the north. (7/30 RT 242-243). As the Staff has noted, the predominant winds at the project site during the dry, summer months are from the north and northwest, thus creating exactly this problem. (Ex. 67, p. 5.1-8).

d. Moving Monitors Away From the Fence Line Is Unsafe and Inconsistent with the Staff's Mitigation Criteria.

During the July 30th hearing, the Staff witness responded to the concerns expressed by the Committee regarding the proximity of the batch plant to the IEEC site by suggesting that the monitors could be moved away from the fence line, closer to the dust generating activities. (7/30 RT 245-246)) This suggestion is unprecedented, and is objectionable in two ways.

First, such a move would be inherently unsafe. Dust generating activity involves, by its very nature, the movement of large vehicles. The placement of a monitoring instrument, which would be (theoretically) checked periodically by the construction mitigation manager, close to the active earth moving area creates an unsafe situation that no owner should be required to accept.

Second, all of the Staff's discussions of monitoring criteria and the objectives of the dust mitigation program are targeted towards minimizing the transport of dust across the fence line. IEEC cannot ensure that dust levels within the active construction site are maintained at or below any specific level. More importantly, the Staff has no basis under CEQA to require anything other than mitigation that is effective at the fence line.

e. There Can't Be "Invisible" Dust Without Visible Dust – Condition AQ-SC4 is Adequate to Ensure Proper Mitigation.

Another reason why Staff's proposed monitoring is unnecessary is that AQ-SC4 prohibits the transmission of any visible dust across the property line. (7/30 TR p. 251-252). The provisions of AQ-SC4 (quoted above) were modeled after the requirements of SCAQMD Rule 403(d)(1), which provides that:

> A person shall not cause or allow the emissions of fugitive dust from any active operation, open storage pile, or disturbed surface area such that the presence of such dust remains visible in the atmosphere beyond the property line of the emission source.

In response, Staff has argued that their real concern regarding particulates is PM_{10}, which they assert cannot be seen and therefore may not be fully addressed by the visible dust rules. (7/30 RT 218). There are two important fallacies to this argument.

First, while *individual* PM_{10} particles are certainly invisible, the control of fugitive dust is not about the control of individual particles. When particles – even particles smaller than 10 microns in size – are present in sufficient concentration, visibility is impaired. How high a concentration is necessary to impair visibility? That depends on a number of factors, including the size and composition of the particles involved. Looking at a more practical example, however, the Committee is well aware of the haze that can be seen across the eastern portion of the South Coast Air Basin during much of the year. This haze is generally attributable to aerosol compounds and exhaust (especially Diesel exhaust) particulate matter. The particles that contribute to this haze are all less than 2.5 microns in size in average concentration ranging from 20 to 50 $\mu g/m^3$.[3] Thus, it is not true to suggest that 24-hour average concentrations in the range of 50 $\mu g/m^3$ of PM_{10} will not result in visible plumes.

The second, and even more basic, fallacy in the Staff's argument is that it is impossible to have "invisible" dust from a dust-generating activity without also creating "visible" dust. (7/30 RT 252). By controlling the visible dust, you are controlling the "invisible" dust as well. This is the basis for the requirement of AQ-SC4, which establishes a clear standard for acceptable levels of visible dust at the fence line. That requirement is sufficient to ensure adequate dust control. Moreover, in sharp contrast with Staff's proposal, this Condition is simple to understand and practical to enforce. This Condition is the only common-sense solution for temporary dust causing activity at a site surrounded by other dust sources.

[3] The average PM_{10} concentrations in Perris range between 35 and 50 $\mu g/m^3$ (Ex. 72); the average $PM_{2.5}$ concentrations in Riverside range between 20 and 30 $\mu g/m^3$ (Ex. 73, 74).

3. Condition AQ-SC5 Should Be Deleted.

The Committee should rely on the expertise of the largest regional air pollution control agency in the nation, and should reject the Staff's attempts to establish a new regulatory program without the benefit of the SCAQMD's extensive experience in this area. In response to a question from the Committee, the SCAQMD witness testified that SCAQMD Rule 403 was sufficient to address construction dust from this project. (7/30 RT 168). The Committee should reject proposed Condition AQ-SC5 in its entirety.

F. IEEC Has Satisfied the Requirements of PRC Section 25523(d)(2) and Should Be Certified.

The last unresolved dispute regarding air quality in this proceeding concerns Staff's assertion that Public Resources Code Section 25523(d)(2)[4] requires that the Applicant secure all of its first year RTCs by a legally enforceable option or purchase agreement prior to certification.[5] The Staff's position ignores fundamental differences between RTCs and typical offsets (i.e., ERCs). As a result of these differences, Staff's position admittedly furthers no substantive environmental protection or other public interest. Rather, Staff takes this position purely as a matter of principle allegedly based in consistency with prior Commission cases and Staff's interpretation of the applicable law. This is ironic because Staff's position is fundamentally at odds with the applicable law as well as the Staff's position in the only other case presenting this question.

[4] All statutory references hereafter in this Brief are to the Public Resources Code unless otherwise specified.

[5] At the Staff's July 8, 2003 workshop, Applicant asked Staff whether there was any action that Applicant could take, without expending funds to acquire RTCs through a purchase or option agreement, that would satisfy the Staff's position. In an answer that clearly is in contrast with the provisions of 25523(d)(2) as amended in 2001, the Staff responded, without equivocation, "no". During the July 30, 2003 hearing, the same question was posed to Staff's air quality witness; the response in this case was essentially the same, although with a little more equivocation. (7/30 RT 271-272) Subsequent to the July 30th hearing, Applicant has confirmed with Staff that the Staff's unequivocal answer of July 8th remains the Staff's position.

1. It is Undisputed That IEEC Satisfies All Applicable SCAQMD Requirements Related to Offsets.

The primary objective of the Commission with respect to the issue of LORS as related to the provision of required offsets is and should be assuring that IEEC satisfies the offset requirements of the South Coast AQMD. On this point, the Applicant (Ex. 2, pp. 5.1-8, 5.1-14; (7/30 RT 137)), the SCAQMD, and the Staff (Ex. 68, p. 5) all agree that the IEEC will fully comply with all applicable District rules.

2. RTCs are Fundamentally Different from ERCs.

Before addressing the specific requirements of Section 25523(d)(2), it is important to understand the differences between RTCs and ERCs. Emission reduction credits ("ERCs") in the South Coast Air Basin are established under the same provisions of state and federal law as are emission reduction credits in other parts of the State. Credits are established and recorded through formal banking and registry programs, and transfers in ownership of ERCs cannot occur without District recordation and approval. Emission reduction credits in the South Coast Air Basin are issued in units of pounds per day, while ERCs in other air districts in California are issued in units of pounds per calendar quarter, pounds per year, or tons per year. Despite the different "currency" of SCAQMD ERCs, the basic operating principle is the same: credits must be surrendered, on a one-time basis, in quantities determined in accordance with District regulations. (Ex. 2, p. 5.1-12).

RECLAIM Trading Credits, or RTCs, are not emission reduction credits. RTCs are unique to the South Coast AQMD, and are the principal currency used in the District's RECLAIM program. There are several key differences between ERCs and RTCs under SCAQMD regulations. (Ex. 2, pp. 5.1-12 to 5.1-13).

- ERCs are issued in units of pounds per day; RTCs are issued in units of pounds.

- ERCs have an indefinite lifetime, and are valid from the date of issuance by the District through the date they are used. Once used, ERCs no longer exist, but the facility which used/surrendered the ERCs has the ability to operate a facility at specified emission rates (related to the quantity of ERCs surrendered) in compliance with District rules for an indefinite period of time. In contrast, RTCs have a lifetime of one year, and are valid only for a specified calendar year and trading cycle. For example, RTCs for 2006 Cycle 1 can be used only in 2006 Cycle 1, and not during any other calendar year or trading cycle.
- ERCs are created through the reduction of emissions from existing sources of air pollution, most often by source operators, but occasionally by the District itself. ERCs are created only after emissions from an existing source have been reduced through the application of emission controls or facility shutdown. RTCs were not created through reductions in emissions from existing sources, and cannot be created through reductions in emissions from existing sources.
- Once created, the value of an ERC (in terms of emissions) does not decline, except in rare cases where the SCAQMD can (and has) adopted regulations to discount the value of outstanding ERCs for specific regulatory purposes. RTCs were issued by the SCAQMD in a fixed amount, and allocated to specific sources, at the start of the RECLAIM program. The quantity of RTCs allocated by the District declined each year from the start of the RECLAIM program through 2003, and remains constant (unless changed by future regulations) for 2004 and beyond.

For these reasons, the regulatory requirements and deadlines established by the SCAQMD differ for ERCs and RTCs for new sources. The SCAQMD requires that ERCs for new sources be surrendered prior to issuance of the permit to construct for a project. In contrast, the SCAQMD requires that a new source demonstrate that is has sufficient RTCs in its account, prior to the commencement of operation, to cover the expected emissions during the first twelve months of operation. For subsequent years, a new source is required to demonstrate that it has sufficient RTCs in its account prior to the start of each compliance year to cover the expected emissions during that compliance year. (Ex. 2, p. 5.1-12).

Thus, for ERCs the SCAQMD requires that credits that cover a project's emissions for its entire life be surrendered prior to construction of a new facility, while for RTCs the SCAQMD requires that credits that cover a project's expected emissions for one year be deposited in the

facilities account prior to the start of each year. This distinction is important to understand the meaning and applicability of 25523(d)(2).[6]

3. Staff's Position Is Based Purely On "Principle" And Not Any Substantive Environmental Protection or Other Public Interest Concern.

There are two substantive policy reasons that Section 25523(d)(2) requires that an Applicant identify its source of offsets prior to certification. First, by identifying the offset, the Applicant enables the Staff to determine the likelihood that sufficient offsets will be available to fully mitigate emissions from the project. Second, identifying the specific offset enables Staff to analyze whether the offset will be of an appropriate type and in an appropriate location.

However, as to the first reason, Staff has testified they are not questioning the availability of RTCs for this project. (7/30 Tr. 283-284). As to the second, Staff also testified that there is no need to require more specific identification of the RTCs than Applicant has provided to conduct any further analysis. (7/30 Tr. 280). Indeed, Staff testified that its demand for agreements for the RTCs is not related to any substantive analytic requirement:

> MR. ELLISON: Well, assuming that we're talking about authentic RTC's that the district recognizes as valid, would the selection of particular RTC's change staff's analysis or its conditions in any way?
>
> MR. BIRDSALL: I don't believe so, no.
>
> MR. ELLISON: Now that's not true for ERC's, correct?
>
> MR. BIRDSALL: That's correct, it is not true for ERC's. (7/30 Tr. 279).

Thus, in contrast with traditional offsets, Staff's position here is not based upon any environmental protection or other public interest concern.

[6] Indeed, because the RTCs are fundamentally different than traditional offsets or ERCs, it is arguable that the requirements applicable to "offsets" in Section 25523(d)(2) do not apply to RTCs at all. Applicant does make that argument here, and the Commission need not resolve it, because here the requirements of Section 25523(d)(2) have been satisfied and therefore the issue is moot.

Instead, Staff takes this position as a matter of "principle" based upon its interpretation of the statute and concerns about consistency with other cases:

> MR. ELLISON: I recall from the July workshop a statement from staff that staff was not really questioning the availability of RTC's for this project, but rather that this was an issue of principal [sic], and the principal [sic] was that other projects had provided them and that therefore this project should provide them. Do you recall that discussion?
>
> MR. BIRDSALL: I recall that. And the principal [sic] applies partially to projects here in the south coast district, here, but it applies really to all of the projects that we treat. And that is that when a project comes forward with an offset strategy, we look to the offset strategy to determine whether the credits have been identified, and this is a test that we apply uniformly to Applicant's throughout the state, regardless of whether they are subject to offsetting requirements through reclaim or through a more traditional ERC program. (7/30 Tr. 283).

On redirect examination, Staff further testified that it believes its demand for the provision of binding agreements for the RTCs is not merely a principle but is required by statute. (7/30 Tr. 290).

As shown hereafter, Staff's statutory argument is wrong: the statute not only does not support Staff's position, it *prohibits* it. Moreover, Staff's argument regarding treating IEEC consistently with other cases is equally inapposite: Staff has recently supported an application that is conceptually and legally indistinguishable from the Applicant's proposal here.

4. Staff's Position that PRC Section 25523(d)(2) Requires Obtaining RTCs Prior to Certification is Wrong.

Public Resources Code Section 25523(d)(2) governs an applicant's obligations to identify and obtain offsets as part of a certification proceeding. That law provides as follows:

> The commission may not find that the proposed facility conforms with applicable air quality standards pursuant to paragraph (1) unless the applicable air pollution control district or air quality management district certifies, prior to the licensing of the project by the commission, that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district's rules or unless the applicable air pollution control district

> or air quality management district certifies that the applicant requires emissions offsets to be obtained prior to the commencement of operation consistent with Section 42314.3 of the Health and Safety Code and prior to commencement of operation of the proposed facility. The commission shall require as a condition of certification that the applicant obtain any required emission offsets within the time required by the applicable district rules, consistent with any applicable federal and state laws and regulations, and prior to the commencement of the operation of the proposed facility. (Emphasis added).

Importantly, Staff and Applicant agree that the obligation to "identify" proposed offset sources and the obligation to "obtain" such offsets are legally distinct concepts in the statute. (7/30 RT p. 275). Prior to amendments to Section 25523(d)(2) during the 2001 legislative session, the Energy Commission interpreted this section as requiring that applicants both identify and obtain offsets prior to certification, notwithstanding that applicable air quality rules generally did not require that offsets be obtained until prior to construction or operation. The Commission interpreted the requirement to "obtain" the offsets as requiring a legally enforceable option or purchase agreement—which, of course, required that the developer make a very significant expenditure for the offsets much earlier than required by air district rules. This was a major concern to developers as it not only created significant inconsistency between rules for power plants and other emission sources, but more importantly because it demanded a significant expenditure of capital before licensing, financing and other development uncertainties could be resolved. Moreover, there was no public interest rationale for requiring this significant expenditure so early, as illustrated by the fact that applicable air quality rules do not require that offsets be obtained prior to licensing.

In response to this concern, and with the Energy Commission's support, the Legislature amended this section of the law to remove the requirement for obtaining offsets prior to licensing and to instead require that the offsets be obtained within the timeframe of the applicable air district rules. The changes made to Section 25523(d)(2) were as follows:

> The commission may not find that the proposed facility conforms with applicable air quality standards pursuant to paragraph (1) unless the applicable air pollution control district or air quality management district certifies, prior to the licensing of the project by the commission, that complete emissions offsets for the proposed facility have been identified and will be obtained by the applicant within the time required by the district's rules or unless the applicable air pollution control district or air quality management district certifies that the applicant requires emissions offsets to be obtained prior to the commencement of operation consistent with Section 42314.3 of the Health and Safety Code and prior to commencement of operation of the proposed facility. ~~prior to the commission's licensing of the project, to the extent that the proposed facility requires emission offsets to comply with local, regional, state, or federal air quality standards.~~ The commission shall require as a condition of certification that the applicant obtain any required emission offsets within the time required by the applicable district rules, consistent with any applicable federal and state laws and regulations, and prior to the commencement of the operation of the proposed facility.

The amendments deleted "prior to the commission's licensing of the project" as a modifier of the obligation to "obtain" offsets and added the critical final sentence. Both of these changes were intended to remove the requirement that offsets be obtained (as opposed to "identified") prior to licensing and to make the Commission's offset requirements consistent with applicable air agency rules.

The new sentence added at the end of this section makes the above-described intent clear: it provides that the Commission "shall require as a condition of certification" that the offsets be obtained "within the time required by the applicable district rules." (Emphasis added). There is no ambiguity or discretion in this requirement. Unless an applicant voluntarily proposes otherwise, the Commission is *required* to ensure that its certificate be consistent with the SCAQMD rules with regard to the timing of obtaining offsets. In this case, there is no dispute that the time required by the SCAQMD rules for acquisition of offsets (including RTCs) is prior to operation—not prior to licensing. (7/30 Tr. at 158).

The Staff's position that the Applicant must acquire offsets through either a purchase or option agreement prior to licensing violates the letter and spirit of the amendments to Section

25523(d)(2). Indeed, not only does the statute not require Staff's position as Staff suggests, it prohibits it: unless the applicant proposes otherwise, the Commission must adopt a condition of certification requiring that these offsets be obtained consistent with the timing of the SCAQMD rules. Staff's proposed conditions AQ-SC9, AQ-27 and AQ-46 satisfy this statutory requirement.

Staff's argument rests upon the implied (though not clearly articulated) premise that the Applicant has failed to sufficiently "identify" its RTCs. This is not correct as discussed later in this Brief in detail. Fundamentally, however, this position ignores that: 1) the Applicant has identified its RTCs sufficiently for Staff to perform all necessary analysis (as discussed above); and 2) Applicant has done everything that can be done to "identify" its RTCs short of actually obtaining them, which the statute plainly does not require. In requiring that a binding agreement be in place for RTCs prior to licensing to "identify" these credits, Staff's position obliterates the clear distinction in the statute between the obligation to "identify" offsets and the obligation to "obtain" them. In so doing, Staff invites the Commission to commit legal error by adopting requirements that are inconsistent with the District rules for obtaining RTCs. Such a condition would violate the consistency requirement of the amendments to Section 25523(d)(2).

5. Staff's Position is Not Consistent with Its Own Prior Positions on This Issue in Another Case.

In the Staff's Supplemental Testimony, the Staff indicated that they had "recently approved other projects that held or had agreements to acquire *very close to* 100 percent of the first-year RTCs." (Ex. 68, p. 5; emphasis added). Thus, Staff implies that the Commission should adopt Staff's position in order to be consistent with these prior cases. In fact, however, Staff's position is not consistent with its own prior position in the only case presenting the same question.

It is true that in prior cases Applicants have possessed all or most of their first-year RTC requirements prior to licensing. However, contrary to Staff's implication, this is not because they – or the Commission – agreed that this was a legal requirement. In fact, as Staff admitted on cross-examination, all the prior cases cited by Staff involving RTCs involved modifications to existing facilities that were allocated RTCs as part of the RECLAIM Program. (7/30 RT p. 282). Thus, these applicants did not make any effort to acquire RTCs in order to comply with perceived Commission requirements nor did the Commission mandate that they do so. They simply happened to have been allocated these RTCs as existing facilities for entirely unrelated reasons and used them to satisfy the "identification" requirement or purchased them for their own reasons. Staff acknowledged on cross-examination that the fact that prior applicants may have voluntarily exceeded legal requirements because it was convenient for them does not justify requiring others to do so in the name of "consistency." (7/30 RT p. 286). Staff further acknowledged that this is the first case in which the Commission has been called upon to resolve a dispute regarding the interpretation of these issues. (7/30 RT p. 287). Thus, it is simply untrue to suggest that the Commission has previously decided this question in favor of Staff's position.[7]

In fact, the only on-point prior case supports the Applicant's position, not the Staff's position. In the El Segundo case, the applicant did not have all of its first-year RTCs as Staff would require here. Indeed, that case presented precisely the same conceptual situation as is presented here: El Segundo possessed some (but not all) of its first RTCs. For the remainder, El Segundo simply identified the RTC program, precisely as the IEEC Project has done here.[8]

[7] Among the several ironies in Staff's position is that Staff argues precedent here while not following it with regard to the soot filter issue—which plainly was litigated and resolved by the Commission in East Altamont.

[8] Admittedly, the proportions in the two cases differ in that El Segundo (as an existing facility) had been allocated 90% of its first-year RTC needs and only 10% were identified merely by reference to the RTC program. However, there is absolutely no basis in the law for distinguishing between these cases based upon the proportion of the RTCs owned. There is nothing in PRC Section 25523(d)(2) which indicates that an Applicant must obtain 90% (or any other fraction) of the required RTCs. In fact, if obtaining 90% of the required first-year RTCs is acceptable, there

(7/30 RT p. 284-285). Nonetheless, Staff concluded that this application met the requirements of Section 25523(d)(2).

Staff's position in this proceeding simply cannot be reconciled with this prior Commission case or the Staff position supporting it. When asked to reconcile these positions on cross-examination, Staff admitted that its position is not consistent with the El Segundo case:

> MR. ELLISON: Okay. Can you explain why the identification of some but not all RTC's meets the statute in El Segundo, but doesn't meet the statute here?
>
> MR. BIRDSALL: I think that it's difficult to pretend that 90 percent of the RTC's being held should be ignored. When staff interprets the statute I can't say that staff has historically interpreted it consistently. It's possible that on El Segundo staff inconsistently interpreted the requirement for identification. Inconsistent with what we are proposing here, and what we are recommending here for this case. (7/30 RT 285-6).

Thus, Staff agrees that its position here is not consistent with its own position in the only other case to present the issue. This admission is devastating to Staff's argument because, as discussed previously, Staff's sole rationale for its position is the "principle" of equity and consistency with prior cases—Staff has acknowledged that it has no other concern. Plainly, the very principle of equity and consistency espoused by Staff requires that the Commission reject Staff's position here in favor of the same position taken in El Segundo. To do otherwise would treat the IEEC inequitably compared to El Segundo.

6. IEEC Has Satisfied the Basic Requirement to Identify (Not Obtain) RTCs

Unlike ERCs, there are no specific certificate numbers for RTCs that can tie them to a specific owner, or location. As Applicant's witness described during the July 30th hearing,

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can be no legitimate reason for rejecting a project that has obtained 80% of the required first-year RTCs – or 50% - or 10%. This is because 25523(d)(2) does not require that any of the first-year RTCs be obtained prior to licensing. Conversely, if the Commission were to adopt Staff's interpretation of the law in this case, then it can reach no other conclusion but that Staff's position in the El Segundo was incorrect.

purchasing RTCs is a little like purchasing ears of corn from a grocery store: you see the display, you pay the price from the seller, and you obtain them. (7/30 RT 151) Once RTCs are transferred from one owner to another, there is no "heritage" or "pedigree" that accompanies them; they are simply placed into the account of the new owner. RTCs are "identified" only with respect to the year (or vintage) of the credits, and their trading zone (inland or coastal). Under SCAQMD regulations, inland facilities (such as IEEC) are entitled to use either inland or coastal RTCs. Thus, the only remaining identification that is possible is the vintage. In the case of IEEC, the vintage is the year in which operation commences, expected to be 2006.

Applicant's air quality testimony satisfies the basic identification requirements for RTCs. Included as Attachment 3 to that testimony is a letter from a reputable credit broker indicating (1) there are sufficient RTCs available in the market to satisfy IEEC's needs, both for the first year of operation and in perpetuity thereafter, and (2) identifying ten real sellers of RTCs who have offers to sell pending with the broker for RTCs in quantities sufficient to satisfy IEEC's needs. (Ex. 2, pp. 5.1-53 to 5.1-54) Applicant would have no objection to including these ten sellers in Condition AQ-SC9 with the understanding that if Applicant actually purchased RTCs from different sellers for the first year of operation, Applicant would need to seek approval for an amendment of AQ-SC9 from the Commission.

To go beyond this level of identification, and require the provision of signed purchase or option agreements, would cross the line from identification to obtaining offsets – a line which was clearly created in the 2001 amendments to 25523(d)(2).

7. IEEC Will Accept An Additional Milestone Condition to Ensure that RTCs are Obtained Prior to Commencement of Construction

Although Applicant has fully and completely satisfied the requirements of 25523(d)(2) regarding the identification of RTCs, Applicant understands that this is one of the first major

projects to be licensed at a new site in the South Coast AQMD since the statute was amended. The new site designation is important because most of the major projects in the SCAQMD that have been licensed by the CEC since 2001 have been projects which are existing RECLAIM facilities, thus making "identification" of available RTCs less of an issue.

In recognition of this unique aspect of IEEC, Applicant is willing to voluntarily accept the following additional language, which can be added to AQ-SC9, to ensure that RTCs are obtained in a timely manner:

> Prior to commencement of construction, the project owner shall obtain, through signed purchase or option agreements, sufficient RTCs to satisfy SCAQMD requirements for the first year of operation, as required in proposed Conditions AQ-27 and AQ-46. [Note: this Condition is based upon the Applicant's voluntary proposal to obtain these RTCs earlier than the SCAQMD rules or Public Resources Code Section 25523(d)(2) would otherwise require.]

Applicant offers this language with the full knowledge that it goes beyond the requirements of 25523(d)(2) by requiring that the RTCs be obtained prior to construction rather than operation as the District rules require. Applicant makes this offer to provide the Committee with an additional margin of comfort with respect to the relatively unique circumstances presented in this case.

III. PUBLIC HEALTH

A. Summary

The testimony of the Applicant, Staff, and SCAQMD are all in agreement: the IEEC project will not present any significant public health risks, either individually or cumulatively. (7/30 RT 312-314; 7/30 RT 324; Ex. 48, pp. 34-35).

Applicant's witness, Mr. Gary Rubenstein, presented testimony regarding the potential public health impacts of the IEEC project. (Ex. 2, Section 5.15; 7/30 RT 324-325). Potential

impacts associated with emissions of toxic pollutants to the air from the proposed facility were evaluated in a risk assessment prepared using guidelines developed under the AB 2588 Air Toxics "Hot Spots" Information and Assessment Act. Human health risks were evaluated for a hypothetical maximum exposed individual (MEI). The hypothetical MEI is an individual assumed to be located at the point where the highest concentrations of pollutants in air associated with facility emissions are predicted to occur, based on air dispersion modeling. Human health risks associated with toxic emissions from the proposed facility are unlikely to be higher at any other location than at the location of the MEI. If there is no significant impact associated with toxic concentrations in air at the MEI location, there would be no significant impacts in any location in the vicinity of the facility. (Ex. 2, pp. 5.15-7 to 5.15-9; Ex. 67, p. 5.7-13; 7/30 RT 311). The results from this risk assessment indicate that the estimates of excess lifetime cancer risks and potential non-cancer health effects associated with chronic or acute exposures fall below thresholds used for regulating emissions of toxic pollutants to the air (*Id).* Based on the results of this risk assessment, there are no public health impacts anticipated from emissions of toxic pollutants to the air from the proposed facility. (*Id.*)

The risk assessment evaluated health risks at the theoretical maximum impact location. Estimated risks at this location are well below thresholds of significance established by regulatory agencies. Estimated risks at all other locations would be lower than at this maximum impact location. In the unlikely event that worst-case emissions from an existing facility coincided in space and time at the maximum impact location with emissions from the proposed project, there would be no significant cumulative increase in estimated cancer risks or non-cancer health impacts. (*Id.*)

Use of hazardous materials and other chemicals at the proposed facility will be in accordance with standard practices for storage and management of hazardous materials. Normal use of hazardous materials therefore will not pose significant impacts to public health. While mitigation measures will be in place to prevent releases, accidental releases that could migrate offsite, specifically that associated with release of ammonia vapor, could result in potential impacts to the public. The California Health and Safety Code Sections 25531 to 25541 and Code of Federal Regulations (CFR) Title 40 Part 68 under the Clean Air Act establish emergency response planning requirements for acutely hazardous materials. These regulations require preparation of a Risk Management Plan ("RMP"), which is a comprehensive program to identify hazards and predict the areas that may be affected by a release of an acutely hazardous material ("AHM") (*Id.*)

The Staff's witness, Dr. Alvin Greenberg, independently evaluated the Applicant's estimates of the IEEC's potential contribution to the area's carcinogenic and non-carcinogenic pollutants. (Ex. 67, Section 5.7). Dr. Greenberg testified that he found these assumptions to be acceptable and validated the Applicant's findings. (7/30 RT 311). He explained that the maximum chronic hazard index and acute hazard index were well below Staff's significance criteria, suggesting that these pollutants are unlikely to pose a significant risk of chronic or acute health effects anywhere in the project area. (7/30 RT 312-313).

Given the low cancer and non-cancer risks from all of IEEC's toxic emissions, coupled with the lack of other nearby toxic sources, Staff has determined that the project will not contribute significantly to any area toxic exposure of a cumulative nature. (Ex. 67, pp. 5.7-16 to 5.7-17).

No other party has offered evidence to dispute the finding of the Applicant and Staff witnesses regarding public health impacts. With the implementation of the proposed air quality Conditions of Certification, as proposed to be amended by the Applicant above, IEEC will comply with all applicable public health laws, ordinances, regulations and standards.

IV. GENERAL CONDITIONS

A. If Priority Reserve emission credits are used, Condition COM-15 should require project milestones to be established and agreed upon by the project owner and the CPM no later than 60 days after the Project Owner has received the Permit to Construct from the SCAQMD.

With one exception, the Applicant agrees to Condition COM-15 as set forth on Page 121 of the Staff's Supplemental Testimony and Addendum to the FSA. (Ex. 68 p. 121). Should the project owner use the Priority Reserve emission reduction credits for the project, the Staff proposes that "milestones and methods of verification, must be established and agreed upon by the project owner and the CPM no later than 60 days after *project approval*"[9] which is defined as the "date of docketing" of an unspecified document, presumably the Commission's Decision on the AFC. The Applicant on the other hand, proposed that the milestones be established and agreed upon no later than 60 days "after the Applicant has received the Permit to Construct from the SCAQMD, or California Energy Commission Certification, whichever is later." (7/30 RT 74-75; Ex. 2, p. 3.8-9) The Applicant also proposes to delete the language in the Staff's proposed conditions which states that "If this deadline is not met, the CPM will establish the milestones." (*Id*. at 75)

The intent of COM-15 as proposed by the Staff, appears to be to require the project owner to provide assurance that, in the event that the Priority Reserve is used, the project is constructed in a timeframe meeting the requirements of SCAQMD Rule 1309.1. (*Id.*) Rule

1309.1 specifically requires that the facility "has the new source(s) fully and legally operational at the rated capacity within 3 years following issuance of a Permit to Construct or California Energy Commission certification, whichever is later, subject to an extension by the Executive Officer consistent with SCAQMD Rule 205". (*Id.* at 75-76)

The Applicant has indicated that the IEEC will take approximately two years to construct. Therefore, a requirement that milestones be established and agreed upon within 60 days after receipt of the Permit to Construct will still provide an ample period of time (3 years, less 60 days) in which to complete the project. (*Id.* at 76)

On the other hand, Staff's proposed requirement that the milestones be established and agreed upon within 60 days after the AFC Decision is docketed would be premature because:

- The milestones would have to be established even before the Applicant has determined whether to use the Priority Reserve. (*Id.* at 76)
- Allowing 60 to 90 days for CPM review of the milestones, the milestones would have to be filed even before the AFC decision is issued, in order for the milestones to be "agreed upon" within 60 days after the Decision is docketed.
- If any party files a petition for reconsideration of the Decision, the milestones would have to be filed and agreed upon before a decision on reconsideration has been made.

We believe that a more logical time frame for filing milestones would be promptly after the Applicant has received the permit to construct. As Staff Counsel frankly concedes, the Staff's insistence on filing of the milestones after the Commission decision, rather than after the Permit to Construct is simply based upon "a bureaucratic turf battle." (7/30 RT p. 438). In effect, the Staff's proposed Condition COM 15 seeks to pretend that the Permit to Construct will not be issued. In reality, however, as the Applicant's expert air quality witness testified, "The south coast district absolutely will not allow construction without their issuance of a separate

[9] Emphasis added.

document, which will be a permit to construct, sometime after the Commission issues it's decision. And that permit to construct will not be issued until certain additional requirements that the district has are satisfied, such as identification of the quantity, for example of priority reserve credits that will be obtained, and payment of the required mitigation fees. So those actions have to occur at some period of time after the Commission decision, but before the permit to construct is issued. And this Applicant absolutely cannot commence construction until that second document is issued." (*Id.* at 94) The District's Staff concurred that a Permit to Construct will be issued subsequent to the Commission's AFC decision. (*Id.* at 159) Thus, except for the interest of promoting a "bureaucratic turf battle," there is no reason on the record of this proceeding, for submission of milestones at any time earlier than the issuance of the Permit to Construct.

V. CONCLUSION

With only three exceptions, Applicant and Staff have agreed upon all of the proposed Conditions of Certification proposed for this Project. As shown in this Brief, in each of these three cases, the Applicant's position has merit and should be adopted by the Commission. Staff's proposal for Condition COM-15 is based upon a "bureaucratic turf battle" and is not practical. Staff's position regarding soot filters in Condition AQ-SC3 is inconsistent with a recent Commission decision on the identical question and imposes requirements that the Air Resources Board and the District do not require or support. Staff's position regarding construction dust monitoring in Condition AQ-SC5 is unnecessary given other applicable requirements and unworkable given the conditions at the site.

Finally, the Commission should reject Staff's argument that the IEEC Project has not complied with Section 25523(d)(2) and instead recognize that this statute—and consistency with

prior Commission cases—requires that RTCs be obtained prior to operation but not prior to certification.

Respectfully submitted,

Dated: August 22, 2003

ELLISON, SCHNEIDER & HARRIS L.L.P.

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-17
Application for Certification for the	)	
Inland Empire Energy Center	)	
	)	

PROOF OF SERVICE

I, Ron O'Connor, declare that on August 15, 2003, I deposited copies of the attached *Applicant's Opening Brief* in the United States mail in Sacramento, California, with first-class postage thereon fully prepaid and addressed to all parties on the attached service list.

I declare under the penalty of perjury that the foregoing is true and correct.

Ron O'Connor

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